

N. KEITH CHAMBERS  
EXECUTIVE DIRECTOR

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>FRANK GONZALEZ,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>and</b>	)	<b>Charge No.: 2006CF2012</b>
	)	<b>EEOC No.: N/A</b>
	)	<b>ALS No.: 07-157</b>
<b>ILLINOIS STATE TOLL HIGHWAY AUTHORITY,</b>	)	
	)	
<b>Respondent.</b>	)	<b>Judge Lester G. Bovia, Jr.</b>

**RECOMMENDED ORDER AND DECISION**

This matter is before the Commission on Respondent's Motion for Summary Decision ("Motion"). Complainant filed a response to the Motion, and Respondent filed a reply. Accordingly, this matter is now ready for disposition.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

**FINDINGS OF FACT**

The following facts were derived from uncontested sections of the pleadings, affidavits, and other documents submitted by the parties. The findings did not require, and were not the result of, credibility determinations. Moreover, all evidence was viewed in the light most favorable to Complainant.

1. Complainant was hired by Respondent on May 23, 1995. Complainant worked as a toll collector.
2. Complainant is a white male.
3. On June 27, 2005, Complainant received a two-day suspension for violating certain of Respondent's attendance rules. Specifically, in its memorandum to Complainant informing him

of the suspension, Respondent advised Complainant that he was being suspended for being unavailable for scheduling on five different occasions in May and June 2005. Respondent also advised Complainant that a suspension was warranted because Complainant had been warned about his poor work attendance in May.

4. On September 12, 2005, Complainant received a five-day suspension for his continued attendance problems, including tardiness, unavailability for scheduling, and early departure.

5. On January 6, 2006, Respondent informed Complainant by letter that his first family medical leave request, which had been approved erroneously for the period of October 25, 2005 to October 25, 2006, actually should have run from November 16, 2004 to November 16, 2005. Accordingly, Respondent advised, Complainant's first medical leave had ended. After being advised that his first medical leave had ended, Complainant requested a second medical leave.

6. Respondent's family medical leave policy provides that employees are eligible for 12 weeks of leave time per year if they: 1) complete one year of service at Respondent; and 2) work at least 1,250 hours in the one-year period immediately preceding the requested leave.

7. Complainant did not work 1,250 hours during the one-year period that was relevant for his second leave request (*i.e.*, during the one-year period from November 15, 2004 to November 15, 2005). Accordingly, Respondent denied Complainant's second leave request.

8. On January 11, 2006, Complainant received a 10-day suspension for further attendance-related infractions between October 2005 and January 2006, including tardiness, unavailability for scheduling, shift refusal, and early departure.

9. Complainant also received verbal, and sometimes harsh, admonishments for other rule violations during his employment with Respondent, including: 1) parking in designated handicapped spots without having a proper decal; 2) wearing a baseball cap at work; 3) wearing blue jeans at work; 4) not wearing a name tag; 5) receiving customer complaints; and 6) allegedly not following proper procedure in the handling of an unpaid toll envelope.

10. On February 9, 2006, Complainant filed a charge with the Department alleging that Respondent suspended him for 10 days, denied his request for medical leave, and harassed him due to his race, gender, and alleged physical and mental handicaps. Complainant's charge does not challenge the two- and five-day suspensions. Respondent denies Complainant's allegations.

11. After 14 more attendance-related infractions from January-April 2006, Respondent suspended Complainant indefinitely pending termination on April 26, 2006.

12. On May 12, 2006, Complainant amended his charge to add allegations that Respondent suspended him indefinitely: 1) in retaliation for his initial charge; and 2) due to his race, gender, and alleged physical and mental handicaps. Respondent denies the allegations in the amended charge as well.

13. Respondent terminated Complainant on May 16, 2006.

#### CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. The Commission has jurisdiction over the parties and subject matter in this case.

3. Complainant's racial and gender discrimination claims must be dismissed because Complainant was not meeting Respondent's legitimate performance expectations.

4. Complainant's racial and gender discrimination claims also must be dismissed because Respondent offered legitimate, nondiscriminatory reasons for each adverse action it took against Complainant, and Complainant offered no evidence that Respondent's reasons were pretextual.

5. Complainant's racial and gender harassment claims must be dismissed because Complainant cannot prove that: 1) Respondent's reprimands constituted harassment under the Act; 2) Respondent's reprimands were based on Complainant's race or gender; or 3)

Respondent's reprimands were severe and pervasive enough to alter the conditions of his employment and create a hostile and abusive working environment.

6. Complainant's physical and mental handicap discrimination claims must be dismissed because the adverse job actions were not related to his alleged handicaps.

7. Complainant's physical and mental handicap discrimination claims also must be dismissed because Respondent offered legitimate, nondiscriminatory reasons for each adverse action it took against Complainant, and Complainant offered no evidence that Respondent's reasons were pretextual.

8. Complainant's physical and mental harassment claims must be dismissed because Complainant cannot prove that: 1) Respondent's reprimands constituted harassment under the Act; 2) Respondent's reprimands were based on Complainant's alleged handicaps; or 3) Respondent's reprimands were severe and pervasive enough to alter the conditions of his employment and create a hostile and abusive working environment.

9. Complainant's retaliation claim must be dismissed because Respondent offered a legitimate, nondiscriminatory reason for the adverse action it took against Complainant, and Complainant offered no evidence that Respondent's reason was pretextual.

10. There is no genuine issue of material fact regarding any of Complainant's claims, and Respondent is entitled to a recommended order in its favor as a matter of law.

## DISCUSSION

### I. SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of

law. Fitzpatrick v. Human Rights Comm'n, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill. App. 3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist. 1979). Although not required to prove his case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill. App. 3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill. App. 3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill. App. 3d at 392, 642 N.E.2d at 490. Where the movant's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill. App. 3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

## II. COMPLAINANT'S RACIAL AND GENDER DISCRIMINATION CLAIMS MUST BE DISMISSED

### A. Standard for Proving Racial and Gender Discrimination Under the Act

Complainant alleges that Respondent suspended him for 10 days, suspended him indefinitely, and denied his request for medical leave due to his race and gender. There are two methods for proving employment discrimination, direct and indirect. Sola v. Human Rights Comm'n, 316 Ill. App. 3d 528, 536, 736 N.E.2d 1150, 1157 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (*e.g.*, a statement by Respondent

that Complainant was being disciplined because of his race and/or gender), the indirect analysis is appropriate here.

The analysis for proving a charge of employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make a *prima facie* showing of discrimination by Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If he does, then Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id. If Respondent does so, then Complainant must prove by a preponderance of evidence that Respondent's articulated reason is merely a pretext for unlawful discrimination. Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 178-79 (1989).

To establish a *prima facie* case of racial discrimination, Complainant must prove: 1) he is in a protected class; 2) he was meeting Respondent's legitimate performance expectations; 3) Respondent took an adverse action against him; and 4) similarly situated employees outside Complainant's protected class were treated more favorably. Interstate Material Corp. v. Human Rights Comm'n, 274 Ill. App. 3d 1014, 1022, 654 N.E.2d 713, 718 (1st Dist. 1995). The applicable test for *prima facie* gender discrimination is identical to the racial discrimination test above. See McQueary and Wal-Mart Stores, Inc., IHRC, ALS No. 9416, November 20, 1998. As discussed below, Complainant cannot establish a *prima facie* case of racial or gender discrimination as a matter of law.

**B. Complainant Cannot Prove Racial or Gender Discrimination In Connection With His Suspensions**

Respondent does not deny that Complainant, a white male, is protected from discrimination under the law. Respondent also does not deny suspending Complainant. Respondent vehemently denies that Complainant was meeting Respondent's legitimate performance expectations.

The evidence shows that Respondent repeatedly warned and disciplined Complainant about his awful attendance record, including tardiness, unavailability for scheduling, refusal of shifts, usage of unauthorized sick days, and early departures. Respondent issued Complainant a written warning on May 10, 2005 for attendance-related infractions. (Brief in Support of Motion, Ex. C.) After Complainant committed five more such infractions from May 11, 2005 to June 9, 2005, Respondent suspended Complainant for two days on June 27, 2005. (Id.) After Complainant committed six more such infractions from July 31, 2005 to August 20, 2005, Respondent suspended Complainant for five days on September 12, 2005. (Brief in Support of Motion, Ex. D.) After Complainant committed 15 more such infractions from October 8, 2005 to January 5, 2006, Respondent suspended Complainant for 10 days on January 11, 2006. (Brief in Support of Motion, Ex. E.) Incredibly, Complainant committed 14 more such infractions from January 9, 2006 to April 7, 2006, and was suspended indefinitely pending termination on April 26, 2006. (Brief in Support of Motion, Exs. F and G.) Respondent terminated Complainant on May 16, 2006. (Brief in Support of Motion, Ex. H.)

Complainant has not disputed any of Respondent's evidence as mistaken or inauthentic. In his interrogatory responses, Complainant quibbled about only a few of the infractions, claiming not to remember one of the unauthorized sick days he was accused of taking and denying that he was unavailable for work on one of the days cited by Respondent. (Brief in Support of Motion, Ex. L.) Complainant also has acknowledged that being unavailable for scheduling violated Respondent's policies, and violated a condition of his employment. (Id.)

Therefore, no genuine issue of material fact remains regarding whether Complainant was meeting Respondent's legitimate performance expectations. Clearly, Complainant was not. Accordingly, Complainant cannot establish a *prima facie* case of racial or gender discrimination as a matter of law.

Moreover, assuming *arguendo* that Complainant could establish *prima facie* racial and/or gender discrimination, Respondent has offered a legitimate, nondiscriminatory reason for

Complainant's suspensions: Complainant's bad attendance. Because Complainant has offered no evidence to suggest that Respondent's reason for the suspensions is pretextual, Complainant's racial and gender discrimination claims fail on this additional ground.

C. Complainant Cannot Prove Racial or Gender Discrimination In Connection With The Denial of His Second Family Medical Leave Request

As with the claims involving Complainant's suspensions, Respondent does not dispute 1) Complainant's right, as a white male, to be free from employment discrimination; or 2) that Respondent took adverse action against Complainant by denying his second family leave request. Respondent does deny, of course, that Complainant was meeting Respondent's legitimate performance expectations.

In light of the foregoing discussion regarding Complainant's work attendance, the medical leave claims can be dispatched quickly. In short, Complainant was not meeting Respondent's legitimate performance expectations and, thus, cannot establish a *prima facie* case of racial or gender discrimination in connection with those claims as a matter of law. Moreover, as with the suspension claims, Respondent has provided a legitimate, nondiscriminatory reason for denying Complainant's second medical leave request, which Complainant has not challenged as pretextual: Complainant simply did not qualify for medical leave.

Respondent's written family medical leave policy provides that employees are eligible for 12 weeks of leave time per year if they: 1) complete one year of service at Respondent; and 2) work at least 1,250 hours in the one-year period immediately preceding the requested leave. (Brief in Support of Motion, Ex. M.) On January 6, 2006, Respondent informed Complainant by letter that his first family medical leave request, which had been approved erroneously for the period of October 25, 2005 to October 25, 2006, actually should have run from November 16, 2004 to November 16, 2005. (Brief in Support of Motion, Ex. J.) Accordingly, Respondent advised, Complainant's first medical leave had ended. (Id.) After being advised that his first

medical leave had ended, Complainant requested a second medical leave; it is Complainant's second leave request that is at issue in this case.

Complainant clearly had been employed by Respondent for more than one year; he joined Respondent on May 23, 1995. (Brief in Support of Motion, Ex. F.) However, Complainant admitted that he did not work 1,250 hours during the one-year period that was relevant for Complainant's second request (*i.e.*, during the one-year period from November 15, 2004 to November 15, 2005). (Brief in Support of Motion, Ex. L.)

### III. COMPLAINANT'S RACIAL AND GENDER HARASSMENT CLAIMS MUST BE DISMISSED

Complainant asserts that Respondent subjected him to racial and gender harassment and provided the following examples: 1) Complainant's supervisor Robert Howlett reprimanded Complainant, by "yell[ing] and scream[ing] at him in an abusive manner," for parking in designated handicapped spaces without a handicap decal; 2) Complainant received "multiple suspensions for unsubstantiated customer complaints;" 3) another supervisor, Reed Mullin, reprimanded Complainant for not following proper procedure in the handling of an unpaid toll envelope; 4) Mr. Mullin reprimanded Complainant for wearing a baseball cap at work, although other employees are allowed to do so; 5) Complainant was reprimanded for wearing blue jeans at work, although other employees are allowed to do so; 6) Complainant received written warnings "for going to his doctors;" and 7) another supervisor, Wardel Foreman, "yelled at him" for not wearing a name tag. (Complainant's Affidavit at 1-2.) As discussed below, these reprimands do not support Complainant's racial and gender harassment claims.

To establish a *prima facie* case of racial harassment, Complainant must demonstrate: 1) he was subject to unwelcome harassment; 2) the harassment was based on his race; 3) the harassment was severe and pervasive enough to alter the conditions of his employment and create a hostile and abusive working environment; and 4) there is a basis for employer liability. Beamon v. Marshall & Ilsley Trust Co., 411 F.3d 854, 863 (7th Cir. 2005). The elements for

*prima facie* gender harassment are substantially the same. See Lever and Wal-Mart Stores Inc., IHRC, ALS No. S-10697, January 2, 2001.

Complainant cannot establish any of these elements. First, much of the “harassment” identified above appears merely to be reprimands for Complainant’s repeated rule violations. In fact, nowhere in his affidavit or response brief does Complainant deny violating Respondent’s rules time after time. Complainant merely points his finger at other rulebreakers for some of the violations. Respondent’s reprimands for Complainant’s constant misbehavior do not constitute harassment, even if such reprimands occasionally were as impolite as Complainant alleges.

Second, Complainant has provided no evidence that the “harassment” was based on Complainant’s race or gender. The allegedly harassing statements do not reflect racial or gender animus on their faces. Instead, the reprimands appear to result from Complainant’s behavior. That some of the reprimands were forceful likely was attributable to Respondent’s frustration with Complainant’s attendance and behavior problems, rather than any racial or gender animus. Furthermore, Complainant has not even provided the races or genders of the employees whom Respondent allegedly allowed to violate the rules while “harassing” Complainant about those same rules. In short, Complainant has failed to prove a nexus between the “harassment” and his race or gender.

Third, the “harassment” was not severe enough to create a hostile and abusive working environment. Again, Complainant caused the “harassment” by constantly breaking Respondent’s rules. If Complainant wished for the “harassment” to stop and for the “abusive working environment” to improve, he could have simply started following Respondent’s rules.

Accordingly, no genuine issue of material fact exists regarding Complainant’s racial and gender discrimination claims. Complainant cannot prove that Respondent subjected him to racial or gender harassment as a matter of law.

#### IV. COMPLAINANT’S HANDICAP DISCRIMINATION CLAIMS MUST BE DISMISSED

Complainant alleges that Respondent suspended him for 10 days, suspended him indefinitely, and denied his request for medical leave due to his physical (*i.e.*, a back strain) and mental (*i.e.*, anxiety/stress disorder) handicaps. However, Complainant cannot prove his claims as a matter of law.

To prove a *prima facie* case of handicap discrimination, Complainant must establish that: 1) he was handicapped within the definition of the Act; 2) his handicap was unrelated to his ability to perform the duties of the job he was hired to perform or, if the handicap was related to his ability to perform, after his request, the employer failed to make a reasonable accommodation which was necessary for his performance; and 3) an adverse job action was taken against him related to his handicap. Whipple v. Illinois Dep't of Rehab. Servs., 269 Ill. App. 3d 554, 557, 646 N.E. 2d 275, 277 (4th Dist. 1995). Again, even if Complainant can prove his *prima facie* case, Respondent can undercut Complainant's claim with proof of a legitimate, nondiscriminatory reason for the adverse job action. Acorn Corrugated Box Co. v. Illinois Human Rights Comm'n, 181 Ill. App. 3d 122, 136-37, 536 N.E. 2d 932, 941 (1st Dist. 1989). Complainant would then be required to prove that Respondent's reason is pretextual. Id.

Because Complainant's handicap discrimination claims easily can be dispatched on other grounds, it is not necessary to discuss whether Complainant's alleged back strain and anxiety/stress disorder constitute handicaps under the Act. Complainant's claims fail at the third *prima facie* element or, in the alternative, upon Respondent's proof of legitimate, nondiscriminatory reasons for the adverse job actions. In short, the adverse job actions at issue clearly had nothing to do with any alleged handicap discrimination. Respondent suspended Complainant for 10 days, and then indefinitely, due to his awful attendance record. Also, Respondent denied Complainant's second medical leave request because he did not qualify for

medical leave.<sup>1</sup> Moreover, Complainant has offered no evidence that Respondent's reasons for the adverse actions are mere pretexts.

Accordingly, Complainant cannot prove any of his claims alleging handicap discrimination, and no genuine issue of material fact exists regarding those claims.

#### V. COMPLAINANT'S HANDICAP HARASSMENT CLAIMS MUST BE DISMISSED

Complainant's physical and mental handicap harassment claims mirror his racial and gender harassment claims. Complainant alleges that the "harassing" reprimands he experienced were somehow motivated by Complainant's alleged handicaps. Complainant cannot prove his handicap harassment claims either as a matter of law.

As this Commission has noted in the past, "[t]here is virtually no case law in this forum on the issue of handicap harassment." Martin and Chicago Bd. of Ed. and Ashley's Cleaning Serv., Inc., IHRC, ALS No. 11640, August 12, 2002. Nevertheless, as the Commission also noted in Martin, there is no logical reason why the Act should tolerate workplace harassment based on a handicap when it does not tolerate harassment based on any other protected classification. Id. Therefore, Complainant's handicap harassment claims should be analyzed in the same manner as the racial and gender harassment claims.

In short, Complainant's handicap harassment claims suffer the same fate as the racial and gender harassment claims for the same reasons: 1) the reprimands Complainant describes do not constitute harassment; 2) Complainant has provided no evidence of a nexus between the "harassment" and his alleged handicaps; and 3) the "harassment" was not severe enough to

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<sup>1</sup> Neither Complainant nor Respondent substantively and completely addressed the issues raised by the second *prima facie* element. Complainant asserts that he made an oral request for an accommodation, namely, set working hours. (Complainant's Affidavit at 3.) However, it is unclear whether Complainant's alleged handicaps affected his ability to perform his job as a toll collector because neither party offered any evidence regarding what toll collectors' duties are. It is also unclear whether Complainant's request was ever honored by Respondent, or how a set work schedule was necessary for Complainant to perform his job. Nonetheless, as with the issue of whether Complainant's alleged handicaps suffice under the Act, the accommodation issue also is moot because of Complainant's failure to prove that the adverse job actions had anything to do with the alleged handicaps.

create a hostile and abusive working environment, as Complainant could have stopped the "harassment" at any time simply by following Respondent's rules.

Accordingly, even if a cause of action exists for handicap harassment, Complainant cannot prove that Respondent subjected him to handicap harassment as a matter of law. As a result, no genuine issue of material fact remains regarding that claim.

#### VI. COMPLAINANT'S RETALIATION CLAIM MUST BE DISMISSED

Complainant asserts that Respondent suspended him indefinitely pending termination on April 26, 2006 in retaliation for Complainant's filing of his initial charge of discrimination on February 9, 2006. Complainant cannot prove retaliation as a matter of law.

To establish a *prima facie* case of retaliation, Complainant must show that: 1) he engaged in a protected activity; 2) Respondent committed an adverse action against him; and 3) there was a causal nexus between the protected activity and the adverse action. Carter Coal Co. v. Human Rights Comm'n, 261 Ill. App. 3d 1, 7, 633 N.E.2d 202, 207 (5th Dist. 1994). Proof of causal connection can be established indirectly by showing that: 1) the protected activity was followed closely in time by an adverse action; or 2) similarly situated fellow employees who did not participate in the protected activity were not subject to the adverse action. Craig and Ill. Dep't of Employment Sec., IHRC, ALS No. S-5313, December 10, 1996. If a complainant can establish a *prima facie* case of retaliation, the burden shifts to the respondent to offer a legitimate, nondiscriminatory reason for the adverse job action. Id. After the respondent's proof of a legitimate, nondiscriminatory reason for the adverse job action, the complainant must prove that the offered reason is a pretext for unlawful retaliation. Id.

In this case, Complainant's filing of his initial charge of discrimination is a protected activity under the Act. Also, Complainant's indefinite suspension surely qualifies as an adverse action. Furthermore, under a liberal construction of the facts in Complainant's favor, the three-month gap between the initial charge and the indefinite suspension is small enough to create an inference of a causal nexus between the two. Nevertheless, as with Complainant's other claims

in this case, his retaliation claim fails due to Respondent's proof of a legitimate, nondiscriminatory reason for the indefinite suspension: Complainant's bad attendance record.

According to Respondent's records, the authenticity and accuracy of which Complainant has not challenged, Complainant committed 14 attendance-related infractions from January-April 2006. (Brief in Support of Motion, Ex. F.) Nine of the 14 infractions occurred during the three-month time period between Complainant's initial and amended charges. (Id.) Also, by that time, Complainant had already earned two-, five-, and 10-day suspensions for attendance-related infractions. Moreover, Complainant, by his own admission, had been reprimanded numerous times for assorted other rule violations. Complainant offers no suggestion as to what else Respondent could have done, short of suspending him indefinitely, to convey its displeasure to Complainant regarding his work. Complainant also offers no evidence that Respondent's reason for suspending him indefinitely is merely a pretext.

#### RECOMMENDATION

Based on the foregoing, there is no genuine issue of material fact regarding Complainant's claims of discrimination, harassment, and retaliation, and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that: 1) Respondent's Motion for Summary Decision be granted; and 2) the complaint and both underlying charges be dismissed in their entirety with prejudice.

#### **HUMAN RIGHTS COMMISSION**

BY: \_\_\_\_\_

**LESTER G. BOVIA, JR.  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION**

ENTERED: October 28, 2009